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CRIMINAL LAW AND PROCEDURE

*Cheney C. Joseph, Jr.**

PRINCIPAL THEORY OF CRIMINAL LIABILITY

In *State v. McAllister*[1] David Rachal and Christopher McAllister were jointly indicted and tried for first degree murder. Rachal was convicted of manslaughter, but the jury was unable to reach a verdict as to McAllister. Following the mistrial, McAllister moved to quash the indictment, contending that the manslaughter conviction of Rachal, the "actual perpetrator of the homicide,"[2] barred a subsequent prosecution of him for a greater degree of homicide.

The Louisiana Supreme Court rejected this reasoning; the mere fact that the jury had found that Rachal had acted in a heat of passion did not preclude the state from charging that McAllister had acted without the "mitigating element" of "passion." The court was very explicit in announcing the broad principle that "one who aids and abets in the commission of a crime may be charged and convicted with a higher or lower degree of crime depending on the mental element proved at trial."[3]

The court's rationale is both logical and sound: two persons can act jointly with differing states of mind. The *McAllister* approach clearly recognizes this distinction.

DANGEROUS WEAPON – ARMED ROBBERY AND AGGRAVATED BATTERY

A state of confusion has existed since the supreme court in *State v. Johnston*[4] and *State v. Levi*[5] indicated that the response of the victim could be considered in determining whether the manner of use of an object created a risk of harm. Under the Criminal Code's definition of "dangerous weapon," the focus in each case must be on the manner of use of the instrumentality rather than on its inherently dangerous charactristics.[6] Thus, a thing not designed to inflict harm can become a "dangerous weapon" due to the manner

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1. 366 So. 2d 1340 (La. 1978).
2. *Id.* at 1342.
3. *Id.* at 1343.
4. 207 La. 161, 20 So. 2d 741 (1944).
5. 259 La. 591, 250 So. 2d 751 (1971).
6. LA. R.S. 14:2(3) (1950) provides: "'Dangerous weapon' includes any gas, liquid or other substance or instrumentality, which, *in the manner used*, is calculated or likely to produce death or great bodily harm." (Emphasis added.)

in which it is used. Under the *Johnston-Levi* theory, a reasonable argument can be made that objects incapable of inflicting injury, such as a toy gun, can nevertheless be used to create highly charged atmospheres in which the danger comes from the victim's potential reaction, and not from harms the offender could inflict with the instrumentality itself.

Under this potential reaction theory, the "dangerousness" appears to depend more on the victim's reasonable, subjective belief that the offender is armed rather than on the nature of the instrumentality itself. The supreme court has recognized that this may lead to an unduly expansive notion of the term "dangerous weapon," particularly in armed robbery cases.

The supreme court took the opportunity in *State v. Bonier*[7] to discuss the problem created by jurisprudential efforts to clarify the relationship between "dangerous weapon" and the victim's potential reaction. The court maintained that the test of dangerousness does not lie "exclusively in the subjective characterization by the victim of whether he is in danger."[8] Although recognizing that the victim's violent reaction is a factor from which the jury can find "an actual likely danger of serious bodily harm," the court emphasized that the "actual likelihood of danger," and not merely the victim's "subjective reaction," is critical.[9] Although *Bonier* has not completely resolved the problem, the court has recognized the conceptual difficulties and has at least attempted to clarify one point: the victim's subjective belief is not the sole factor to consider in determining whether the instrumentality is a dangerous weapon.

It is submitted that the court should consider the relationship in armed robbery cases between the term "armed" and the term "dangerous weapon." The court could logically take the position that, by use of the term "armed," the legislature intended to impose the more severe penalty attached to armed (as opposed to simple) robbery only when the instrumentality is itself capable of inflicting harm. The term "armed" connotes the availability of some instrument capable of inflicting harm.

In *State v. Legendre*[10] the supreme court quashed an indictment which charged that the accused committed aggravated battery by using a concrete parking lot to inflict injury on the victim; apparently, the defendant had forcibly thrown the victim against the concrete. The court refused to allow the prosecution to support its

7. 367 So. 2d 824 (La. 1979).
8. *Id.* at 826.
9. *Id.* at 826-27.
10. 362 So. 2d 570 (La. 1978).

charge on the theory that such an action constituted "use"[11] of the concrete parking lot in a manner calculated or likely to cause death or great bodily harm. Certainly, an aggravated battery charge would lie had the defendant picked up a piece of concrete from the lot and struck the victim. However, had the court adopted the state's theory in *Legendre*, the crime of aggravated battery would have been given an expansive interpretation not contemplated by the legislature. The concept of "use" of the instrumentality in aggravated battery should be restricted to situations in which the accused takes physical control of an object and moves it to batter the victim—as opposed to situations in which the defendant takes physical control of the victim and hurls him against the object.

DIMINISHED CAPACITY

In *State v. Lecompte*,[12] the supreme court, in a very concise opinion by Justice Blanche,[13] rejected the defense's contention that evidence of mental conditions not constituting "insanity," as defined in Criminal Code article 14, was admissible to reduce the grade of the offense by defeating specific intent or special knowledge.[14] Justice Blanche expressed concern that, should "diminished capacity" be accepted as a defense, it would facilitate the introduction of psychiatric or other expert opinion evidence on the question of intent. He preferred to accept only traditionally admissible evidence on the issue of intent and to leave the question to the sound judgment of a jury "unaided by the advice of others."[15]

Justice Tate, in a concurring opinion, argued for the introduction of the diminished capacity defense in Louisiana. In *State v. Jones*,[16] decided almost exactly one year prior to *Lecompte*, Justice Tate noted that Louisiana was in the minority in rejecting the defense, but that the supreme court was "not willing . . . to reconsider Louisiana's jurisprudential rule."[17]

The legislature's express statement in article 14, *i.e.*, restricting the insanity defense to cases in which the defendant lacks the abili-

11. LA. R.S. 14:2(3) (1950). See note 6, *supra*.

12. 371 So. 2d 239 (La. 1979) (on rehearing).

13. Former Chief Justice Sanders had authored the opinion on original hearing. After rehearing was granted, the Chief Justice retired and the remaining members of the court were evenly divided on the issue. Justice Blanche, the new member of the court, adopted Chief Justice Sanders' views.

14. LA. R.S. 14:14 (1950) provides: "If the circumstances indicate that because of a mental disease or mental defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility."

15. 371 So. 2d at 245.

16. 359 So. 2d 95 (La. 1978).

17. *Id.* at 98.

ty to distinguish right from wrong, strongly supports the majority's view in *Lecompte*. Although the prosecution must prove specific intent or special knowledge in some crimes, the supreme court is unwilling to permit juries to consider evidence of mental disease or defect short of the "M'Naughten" standard[18] for the purpose of proving or disproving such intent or knowledge. Only the traditional modes of proof can be utilized to establish the existence *vel non* of specific intent or special knowledge; the testimony of psychiatrists or psychologists concerning the defendant's peculiar mental condition is inadmissible in this regard.

RECEIVING STOLEN PROPERTY—RECEIPT BY OWNER'S AGENT

The supreme court held in *State v. Nguyen*[19] that the legislature did not intend to penalize a person who knowingly received stolen property if he received the property as an agent of the owner with an intent to restore it to its owner. The court reasoned that when stolen property is received by one who is acting as the owner's agent, it loses its "stolen nature."[20]

It remains unclear, however, whether the supreme court will treat the agency relationship as an affirmative defense or will require the state to prove that the receiver acted with an intent to deprive the owner of his property.[21] In resolving this dilemma, it seems apparent that the court could follow either of two lines of analysis. One approach is to consider that, once the state proves that a person knowingly received stolen property, the burden shifts to the defendant to prove by a preponderance of evidence that he was acting as agent of the owner and intended to restore the property. Another would be to hold that, should the defense be "raised,"[22] the state must bear the burden of proving beyond a reasonable doubt that the defendant acted with a corrupt intent, that is, with an intent to deprive the owner of his property.

The writer feels that the matter should be treated as an affirmative defense in the nature of justification. Even though the letter of the statute may have been violated, one who received stolen

18. See note 14, *supra*.

19. 367 So. 2d 342 (La. 1979).

20. *Id.* at 344-45.

21. The court in *Nguyen* specifically noted that it need not decide whether receiving stolen property requires proof that the receiver acted with an intent to deprive the owner of his property. *Id.* at 345.

22. The writer does not know exactly how one "raises" defenses. However, this does not seem to be a problem. For example, if self-defense is raised, the state must prove that the accused did not act in self-defense. *See* State v. Patterson, 295 So. 2d 792 (La. 1974).

goods in order to return them to the owner is certainly justified in acting as he did.

SIMPLE ESCAPE—DEFENSE OF MEDICAL NECESSITY

In *State v. Boleyn*[23] the supreme court recognized the defense of "necessity for escape" when an inmate is faced with a specific and imminent threat of forcible sexual attack or substantial bodily harm. This jurisprudentially created defense differs from the Criminal Code's defense of compulsion primarily in the degree of immediacy required. Compulsion requires a showing that the defendant feared that the threat of harm would *immediately* be carried out. Such is not the case, however, for the defense of necessity of escape.

The supreme court in *State v. Jacobs*[24] also indicated a favorable attitude toward a defense of medical necessity in escape cases.[25] In order to establish this affirmative defense,[26] the prisoner must prove the following:

(1) The prison officials were made aware of his medical condition but nevertheless denied him treatment.

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23. 328 So. 2d 95 (La. 1976).

24. 371 So. 2d 801 (La. 1979).

25. *Id.* at 802. The defendant's conviction was affirmed, however, because he failed to establish the "minimum conditions" necessary to raise the defense.

The Lousiana Supreme Court quoted with approval the following guidelines adopted by the South Carolina Supreme Court in *State v. Worley*, 265 S.C. 551, 220 S.E.2d 242 (1975):

> There possibily may be situations when a prisoner's dilemma is so serious an escape could be justified. If a prisoner is in need of emergency medical treatment to avoid death or immediate, serious permanent bodily injury, he may have a defense of necessity submitted to the jury. Certain minimum conditions are set forth as guidelines which must be satisfied before this defense is available.
>
> (1) The prisoner must have informed prison officials of the condition, in writing, unless admitted by the prison officials, and have been denied professional medical care;
>
> (2) There must not be time to resort to the courts;
>
> (3) The escape must be without use or threat of use of force;
>
> (4) The escapee must promptly seek professional medical treatment;
>
> (5) The treating physician, or if he is unavailable, a physician responding to a hypothetical question, must testify the prisoner was *actually* in danger of death or immediate serious permanent bodily injury unless the prisoner was given prompt professional medical treatment;
>
> (6) After seeing the physician, the prisoner must immediately surrender himself to the authorities.

Id. at 554-55, 220 S.E.2d at 243.

26. Although not specifically discussed, the issue of burden of proof seems to rest with the defendant to establish the conditions necessary to assert the defense. As with other affirmative defenses, the accused must prove his contentions by a preponderance of evidence. For the defense of compulsion in the Criminal Code, *see* LA. R.S. 14:18(6) (1950).

(2) After his non-forcible escape, he immediately resorted to medical treatment and surrendered to the authorities immediately afterwards.

(3) The threat to his health was so great that he was without time to resort to the courts.

In the writer's view, it would be unreasonable to expect a prisoner *not* to escape under the conditions required to establish the defense. Although the Code's defense of compulsion would be unavailable in this situation, the legislature obviously did not intend to penalize such offenders. The significance of *Boleyn* and *Jacobs* lies in the willingness of the court to create affirmative "necessity" defenses not contemplated by the general article on justification in the Louisiana Criminal Code.

FIRST DEGREE MURDER—"IMPLIED AMENDMENT"

In 1976, in response to the United States Supreme Court's opinions in *Gregg v. Georgia*[27] and related cases, Louisiana adopted a bifurcated trial scheme for first degree murder.[28] The legislature had previously mandated the death penalty for all killings committed with the specific intent under certain aggravating circumstances, such as during the commission of an armed robbery.[29] The aggravating circumstances were elements of the mandatory death penalty offense of first degree murder, and not merely sentencing considerations.

The 1976 amendments removed the aggravating factors as elements of the offense. First degree murder was defined as "the

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27. 428 U.S. 153 (1976).

28. 1976 La. Acts. No. 694, *adding* LA. CODE CRIM. P. arts. 905-05.9.

29. LA. R.S. 14:30 (Supp. 1973) (as it appeared prior to 1976 La. Acts, No. 657). The 1973 version of article 30 provided:

> First degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
>
> (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
>
> (3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
>
> (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person;
>
> (5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.
>
> . . . .
>
> Whoever commits the crime of first degree murder shall be punished by death.

killing of a human being when the offender [acted with] a specific intent to kill or to inflict great bodily harm."[30] The various aggravating circumstances previously found in the definition of the crime were now to be considered by the jury during the penalty phase.[31]

The result of the amendments was to include all specific intent killings within the category of first degree murder. Additionally, all specific intent killings had to be handled as capital cases, with the attendant procedural complexities,[32] despite the absence of any aggravating circumstance justifying the death penalty.[33]

In 1977, the legislature amended the second degree murder statute to include specific intent killings committed without aggravating circumstances.[34] Confusion immediately resulted, for first

30. 1976 La. Acts, No. 657, *amending* LA. R.S. 14:30 (Supp. 1973). The 1976 version of article 30 provided:

> First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.
>
> Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury.

31. LA. CODE. CRIM. P. art. 905.4, *added by* 1976 La. Acts, No. 694. This article was amended by Act 74 of 1979. See note 103, *infra*. The 1976 version of article 905.4 provided:

> The following shall be considered aggravating circumstances:
>
> (a) The offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery;
>
> (b) The victim was a fireman or peace officer engaged in his lawful duties;
>
> (c) The offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping;
>
> (d) The offender knowingly created a risk of death or great bodily harm to more than one person;
>
> (e) The offender offered or has been offered or has given or received anything of value for the commission of the offense;
>
> (f) The offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;
>
> (g) The offense was committed in an especially heinous, atrocious or cruel manner.

32. *E.g.*, mandatory sequestration of jurors, LA. CODE CRIM. P. art. 791, and a unanimous verdict, LA. CODE CRIM. P. art. 782.

33. *See* LA. CODE CRIM. P. art. 905.4. For the text of this article, see note 31, *supra*. For the 1979 amendment to article 905.4, see note 103, *infra*.

34. 1977 La. Acts, No. 121, *amending* LA. R.S. 14:30.1 (Supp. 1976). The 1977 version of article 30.1 provided:

> Second degree murder is:
>
> A. The killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill; or
>
> B. The killing of a human being when the offender has a specific intent to kill,

degree murder was also a specific intent killing committed without aggravating circumstances, since the presence or absence of aggravating circumstances was a penalty issue.

In *State v. Payton*[35] the Louisiana Supreme Court eliminated this confusion by finding that the 1977 amendment to second degree murder evinced a legislative intent to remove specific intent killings committed without aggravating circumstances from the first degree murder category. Under the court's "implied amendment" theory, the state was required to prove the existence of an aggravating circumstance in its case in chief on the question of guilt or innocence. Aggravating circumstances, therefore, once again became elements of the offense, not merely penalty considerations.

The supreme court in *Payton* logically reached the conclusion that several aggravating circumstances could not serve as elements of first degree murder. The "heinous, atrocious or cruel" manner of commission, properly a penalty consideration, was deemed too vague to serve as an element of the offense. Additionally, the court found that the accused's prior conviction for an unrelated murder or the fact that he committed the offense while serving a sentence for an unrelated forcible felony dealt with his character and not with the manner in which he committed the killing. Therefore, neither of these two aggravating circumstances could serve as an element of first degree murder.

In 1978, almost immediately after the decision in *Payton* was announced, on recommendation of the Louisiana State Law Institute, the legislature repealed the provision of the second degree murder article which was the source of the "implied amendment" theory.[36]

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under circumstances that would be first degree murder under Article 30, but the killing is accomplished without any of the aggravating circumstances listed in Article 905.4 of the Louisiana Code of Criminal Procedure.

Whoever commits the crime of second degree murder shall be imprisoned at hard labor for life and shall not be eligible for parole, probation, or suspension of sentence for a period of forty years.

35. 361 So. 2d 866 (La. 1978).

36. 1978 La. Acts, No. 796, *amending* LA. R.S. 14:30.1 (Supp. 1977). Paragraph B of the 1977 version of article 30.1, see note 34, *supra*, the provision precipitating the *Payton* holding, was repealed by the 1978 legislature. The 1978 version of article 30.1 provided:

Second degree murder is the killing of a human being when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

Whoever commits the crime of second degree murder shall be punished by life imprisonment at hard labor without benefit of probation or suspension of sentence and shall not be eligible for parole for forty years.

Thus, the *Payton* definition was applicable only for offenses committed from September 8, 1977, until September 7, 1978.[37]

The definition of first degree murder, however, was still unresolved. Apparently the Louisiana district attorneys favored the result in *Payton*. During the 1979 legislative session, at the urging of the prosecutors, the definitions of first and second degree murder were amended to reflect the status of the law under *Payton*.[38] Again the state must prove an "aggravating circumstance" as an element of the crime of first degree murder, not merely as a penalty consideration at the sentencing trial. Although the aggravating elements of the offense are not quite the same as the aggravating penalty considerations of the Code of Criminal Procedure, they are similar. Significantly, as under the 1977 amendment as interpreted by *Payton*, the 1979 amendment allows the state to prosecute an "unaggravated" specific intent murder as a second degree murder. The special procedural aspects of capital cases, such as mandatory sequestration of the jury and a unanimous verdict, will not be required in such noncapital murders.[39]

POSSESSION OF MARIJUANA

In *State v. Chrisman*[40] the supreme court held that the Louisiana

37. *See* State v. Perkins, 375 So. 2d 1179 (La. 1979).

38. 1979 La. Acts. No. 74, *amending* LA. R.S. 14:30-30.1 (Supp. 1978). LA. R.S. 14:30 (Supp. 1979) provides in pertinent part:

> First degree murder is the killing of a human being:
>
> (1) when the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simply robbery;
>
> (2) when the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;
>
> (3) when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
>
> (4) when the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

LA. R.S. 14:30.1 (Supp. 1979) provides in pertinent part:

> (1) when the offender has a specific intent to kill or to inflict great bodily harm; or
>
> (2) when the offender is engaged in the perpetration or attempted perpetration of aggravated rape, aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery, even though he has no intent to kill or to inflict great bodily harm.

39. *Compare* LA. R.S. 14:30 (Supp. 1973), see note 29, *supra*, with LA. R.S. 14:30 (Supp. 1979), see note 38, *supra*.

40. 364 So. 2d 906 (La. 1978).

constitutional right to privacy in one's own home[41] is not violated by prohibitions against the home possession of marijuana for personal use. The supreme court found that the defendant failed to carry his burden of establishing that the legislature had no reasonable basis for enacting prohibitions against marijuana to protect public health, safety, and welfare.

ATTEMPTED INCITING TO RIOT— ATTEMPTS TO COMMIT INCHOATE OFFENSES

The supreme court in *State v. Eames*[42] reversed the defendant's conviction for attempting to incite a riot. Finding that inciting to riot is an inchoate offense like attempt and conspiracy, the court, in an opinion authored by Justice Dixon, held that there could be no attempt to commit such an offense. Justice Dixon relied on an earlier unreported case, *State ex rel. Duhon v. General Manager, Louisiana State Penitentiary*,[43] in which the supreme court approved without discussion the granting of a writ of habeas corpus to a prisoner convicted of attempted conspiracy.

The view that there can be no attempt to commit an inchoate offense is eminently valid. Justice Dixon's approach was sound in that he examined the nature of the offense in determining whether it was an inchoate one. However, inciting to riot can be committed by endeavoring to have others riot as well as by participating in a riot. Participation should not be considered an inchoate offense. In a dissenting opinion in *Eames*, former Chief Justice Sanders argued that the defendant was properly convicted of *attempting to participate* in a riot. Although attempted incitement to riot should be properly viewed as an inchoate offense, the writer shares the former Chief Justice's view that attempted participation should not.

POSSESSION OF FIREARMS BY FELONS

In 1975, the legislature enacted Criminal Code article 95.1, which prohibits persons convicted of certain felonies from possessing firearms.[44] However, a convicted felon who has not been convicted of

41. LA. CONST. art. I, § 5.

42. 365 So. 2d 1361 (La. 1978).

43. No. 39,091 (La. July 20, 1948). *See* Note, *Criminal Law and Procedure—Attempt and Conspiracy Separate Inchoate Offenses—Relief by Habeas Corpus*, 9 LA. L. REV. 413 (1949).

44. 1975 La. Acts, No. 492, § 2, *adding* LA. R.S. 14:95.1. This article provides:

> A. It is unlawful for any person who has been convicted of first or second degree murder, manslaughter, aggravated battery, aggravated or simple rape, aggravated kidnapping, aggravated arson, aggravated or simple burglary, armed or simple robbery, or any violation of the Uniform Controlled Dangerous Substances

another felony for ten years following his discharge from his sentence is not affected by this statute. Additionally, felons may also apply to the sheriff of their parish of residence for permission to possess firearms.

In *State v. Williams*[45] the supreme court had an opportunity to decide whether the ten-year "cleansing period" was an affirmative defense to be proven by the accused. Although not required to reach the issue, the court emphasized that the state bears the burden of proving that the ten-year period had not lapsed, in effect treating the time period as an element of the offense. The court's decision was based on the "comparative ease" with which the state can prove that the defendant's possession fell within the ten-year period. The court recognized the "easy access" the district attorney had to such information and the difficulty faced by the defendant in seeking to prove a negative; it was also speculated that the defendant may have difficulty obtaining documentation from other jurisdictions and thus might be forced to testify in order to establish the convictionless ten-year period.

While the court's result in *Williams* is certainly fair, the writer feels that the court has not properly assessed the burden of proof in

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Law which is a felony or any crime defined as an attempt to commit one of the above enumerated offenses under the laws of this state, or who has been convicted under the laws of any other state or of the United States or of any foreign government or country of a crime which if committed in this state, would be one of the above enumerated crimes, to possess a firearm or carry a concealed weapon.

B. Whoever is found guilty of violating the provisions of this Section shall be imprisoned at hard labor for not less than three nor more than ten years. If such conviction is for the crime of carrying a concealed weapon, such sentence shall be without the benefit of probation, parole, or suspension of sentence and be fined not less than one thousand dollars nor more than five thousand dollars.

C. Except as otherwise specifically provided, this Section shall not apply to the following cases:

(1) The provisions of this Section prohibiting the possession of firearms and carrying concealed weapons by persons who have been convicted of certain felonies shall not apply to any person who has not been convicted of any felony for a period of ten years from the date of completion of sentence, probation, parole, or suspension of sentence.

(2) Upon completion of sentence, probation, parole, or suspension of sentence the convicted felon shall have the right to apply to the sheriff of the parish in which he resides, or in the case of Orleans Parish the superintendent of police, for a permit to possess firearms. The felon shall be entitled to possess the firearm upon the issuing of the permit.

(3) The sheriff or superintendent of police, as the case may be, shall immediately notify the Department of Public Safety, in writing, of the issuance of each permit granted under this section.

45. 366 So. 2d 1369 (La. 1978).

accordance with the legislative intent. This exception to the firearm possession statute was obviously designed as an affirmative defense to be established by the accused.

It is interesting to note that in *State v. Aguillard*,[46] decided several months after *Williams*, the supreme court found that the defendant had the burden of proving that he was authorized by permit to possess a firearm. Again, the comparative ease of proof appeared to have been the basis for the decision. *Williams* was neither cited nor distinguished in *Augillard*. In both cases, the court was consistent in achieving its result by allocating the burden of proof in accordance with which party can most readily prove the matter at issue, and not by determining whether the legislature really intended the "exceptions" to be elements of the offense or affirmative defenses.

COMPULSORY PROCESS— OUT-OF-STATE WITNESSES

The right of the defendant to compulsory process is embodied in both the state and federal constitutions. In *State v. Hogan*[47] state authorities failed to process timely the defendant's request for a trial subpoena for an out-of-state witness. The witness, a probationer living in Virginia, was a participant in the narcotics transfer for which the defendant was convicted of distribution of heroin. Prior to the trial, the defendant secured a court order directing the district attorney to reveal the witness's name and address. The defendant then requested the issuance of an out-of-state witness subpoena based on the asserted need for the witness to testify to support the defense of entrapment. The Louisiana trial court issued its certificate to the Virginia court in compliance with the Louisiana and Virginia statutes.[48]

When the defense counsel contacted the appropriate sheriff in Virginia to inquire about service, he was informed that the certificate had not been received. Counsel then checked with the clerk of the Louisiana trial court and was assured that the certificate had been sent to the proper authorities. Contacting the Virginia authorities once again, counsel was informed that the sheriff had been in touch with the witness. On the day of trial, the material witness from Virginia had not arrived; and the trial court refused to grant a continuance.

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46. 371 So. 2d 798 (La. 1979).
47. 372 So. 2d 1211 (La. 1979).
48. *See* LA. CODE CRIM. P. art 741; VA. CODE §§ 19.2-273 to -276 (1950).

The supreme court had no difficulty in getting immediately to the core of the matter. The fact that the trial had commenced prior to the defense counsel's request for a delay did not control. The court, citing *State v. Mizell*,[49] said that it would treat the defense motion as one for a recess. Hence, the failure of the defendant to comply with the formal requisites of the motion for a continuance was not controlling.

The court determined that due diligence had been exercised by the defendant and that the defendant showed that the witness probably would have appeared had the proper steps been taken. This, according to the court's approach, shifted the burden to the state to explain the failure of the authorities to properly serve the subpoena.

The effect of the decision is limited because the defense counsel made a very strong showing of official failure. It would have been unreasonable to hold the accused responsible for the lack of diligence of the Louisiana or Virginia officials. It would have also been unreasonable to require the defense counsel to show what efforts the officials made to procure the witness. Given the defendant's initial showing, the court wisely shifted the burden to the district attorney to prove that the authorities acted with reasonable diligence.

COMPULSORY PROCESS—DEFENSE WITNESS'S REFUSAL TO TESTIFY

In *State v. Jones*[50] the supreme court held that the defendant's right to compel the testimony of witnesses in his behalf prevails over the witnesses' asserted interest in self-preservation. Thus, the trial court must sanction or threaten to sanction with contempt the witnesses' non-privileged refusal to testify.

The witness in *Jones* was a co-offender who had previously pled guilty. When called by the defense, the witness refused to testify due to his asserted fear for his own safety in prison should he testify. The refusal could not have been predicated on the privilege against self-incrimination because, in conjunction with his guilty plea, the prosecutor offered him immunity.

The supreme court reversed Jones' conviction because the trial court refused to order the witness to testify. There was no showing that the witness faced a real danger of reprisal for testifying as a defense witness. However, this factor did not seem to be significant to the court. Absent some "legally valid" excuse for permitting the witness to refuse to testify, the supreme court adopted the view

49. 341 So. 2d 385 (La. 1976).
50. 363 So. 2d 455 (La. 1978).

that the defendant had a right to require the trial court to invoke its contempt sanction when a witness refuses to testify. Presumably, the only legally valid excuses would be duly recognized privileges or physical inability.

Had the issue been presented as a defense to a contempt citation and had a showing of real danger been made, the court's approach might have been entirely different. The result announced in *Jones* may have been directed solely to trial judges who may be too quick to excuse defense witnesses on the basis of mere claims of fear for personal safety. Should such unsupported claims become "legally valid" excuses to refuse to testify, both the prosecution and the defense would suffer.

The supreme court has clearly placed the burden on the trial court to invoke or threaten to invoke the contempt sanction. It has not attempted to delineate the nature of any required penalty or any possible defenses available to the contemner. The court predicated its position on the broad proposition that the trial court must do all that is within its power to compel a defense witness to testify even if the witness can show real grounds to fear for his safety.

Somewhat reluctantly, the writer must agree with the supreme court's conclusion. Although a "necessity" defense to contempt may have superficial appeal, courts simply cannot allow unlawful threats or fears of unlawful reprisal to defeat their efforts to obtain unprivileged information from witnesses.

TRIAL IN PRISON CLOTHES—HARMLESS ERROR

During the last term, the supreme court dealt with two cases from Orleans Parish in which the defendants in custody were brought to trial in prison jumpsuits. In both cases, the defense objection was raised prior to examination of prospective jurors.

In *State v. Leggett*[51] the supreme court expressed disapproval of the practice[52] but did not reverse the conviction. Utilizing a "harmless error" approach, the court noted that the evidence against the accused was overwhelming. Six months later, however, in *State v. Brown*,[53] the supreme court reversed a conviction because the defendant was compelled to wear an orange-yellow jumpsuit issued by the Orleans Parish prison. Recognizing the rela-

51. 363 So. 2d 434 (La. 1978).

52. The court's disapproval even extended to "attractive" jail clothing not distinctively marked as such. *Id.* at 438.

53. 368 So. 2d 961 (La. 1979).

tionship between the right to appear as an "innocent" man (and not as a "prisoner") and the presumption of innocence, the supreme court emphasized its inability to gauge the actual impact of prison attire on jurors. The defendant's request that he be tried in "civilian clothing" was made well enough in advance of trial clearly to establish that it was not a dilatory tactic. Rather than relying on testimony regarding the jury's ability to recognize such garb as prisonwear, the supreme court reversed, based upon its finding that the accused has a right to stand trial in clothing of non-prison issue.

The position taken by the supreme court in *Brown* is certainly proper. There is little reason to dishonor such a specific and timely request. In order to require strict adherence to constitutionally dictated principles, sometimes the court must reverse convictions despite the error's limited impact in the particular case before it.

SCOPE OF VOIR DIRE EXAMINATION

In three cases decided during the last term, the supreme court reversed convictions due to trial judges' limitations on questions propounded by defense counsel during the voir dire examination.

In *State v. Hayes*,[54] a distribution of heroin case, the defense counsel was not permitted to ask prospective jurors if they wanted to hear the defendant's side of the story despite the judge's admonition that they were not to look unfavorably upon the defendant's failure to testify. In *State v. Boen*,[55] another case of distribution of a controlled dangerous substance, the defense counsel was not permitted to ask prospective jurors if they had friends or relatives who were police officers or if they had occasion to talk with police officers about their work.

In reversing the convictions in each case, the supreme court stressed that a wide latitude must be afforded to the defense counsel in order to effect an intelligent exercise of peremptory challenges. The defense lawyer in *Boen* sought to probe the prospective jurors about their personal relationships with police officers; the defense lawyer in *Hayes* sought to probe prospective jurors' feelings about the failure of non-testifying defendants to directly confront testimony by police narcotics agents.

In the voir dire examination in *State v. Dixon*,[56] the trial judge restricted the defense counsel to asking prospective jurors if they heard the questions previously propounded to other prospective

54. 364 So. 2d 923 (La. 1978).
55. 362 So. 2d 519 (La. 1978).
56. 365 So. 2d 1310 (La. 1978).

jurors and if their answers would be substantially the same. In reversing, the supreme court emphasized the right to a "full voir dire"[57] to aid in the intelligent exercise of peremptory challenges and recognized that the right entails "addressing, hearing and observing the veniremen directly and as individuals."[58] The truncated examination required by the trial court did not comport with Louisiana constitutional standards. The supreme court clearly denounced such "en masse" questions as depriving counsel of essential insights into the understanding and attitudes of prospective jurors.

The supreme court, in consistently emphasizing the relationship between voir dire and peremptory challenges, is strictly enforcing the Louisiana constitutional guarantee.[59] If a "full voir dire" should delay the jury selection process and, hence, the administration of justice, the problem is one that could be rectified by constitutional amendment. The writer is not satisfied that the right to a "full voir dire" is essential to a fair trial. Federal judges are empowered to restrict the scope and manner of examination to a degree far greater than that allowed by the Louisiana constitution.[60] Defendants nevertheless receive fair trials in federal court.

PEREMPTORY CHALLENGES OF BLACK PROSPECTIVE JURORS

Purporting to apply the standard of *Swain v. Alabama*,[61] the Louisiana Supreme Court reversed two convictions due to the prosecutor's use of peremptory challenges to excuse black prospective jurors.[62] The court approached the problem in both cases by finding that the defense established a prima facie showing of systematic and extended use of peremptory challenges to exclude blacks from jury service. Furthermore, it was found that the state failed to carry its burden of showing that the state's actions were due to trial related considerations. In both cases the court found more than a "bare showing" of a "disproportionate" number of blacks being peremptorily excused.

By using the "burden of proof" approach, the court avoided considering the merits of Justice Dennis's concurrence in *State v. Eames*,[63] in which he argued that the *Swain* standard imposed an almost impossible burden and concluded that it was not applicable in

57. LA. CONST. art. I, § 17.

58. 365 So. 2d at 1312.

59. *See* LA. CONST. art. I, § 17.

60. *Compare* FED. R. CRIM. P. 24, *with* LA. CONST. art. I, § 17.

61. 380 U.S. 202 (1965).

62. State v. Washington, 375 So. 2d 1162 (La. 1979); State v. Brown, 371 So. 2d 751 (La. 1979).

63. 365 So. 2d 1361, 1364 (La. 1978) (Dennis, J., concurring).

Louisiana. Justice Dennis maintained that the use of peremptory challenges based on race was impermissible under article I, section 3 of the Louisiana constitution,[64] even if for "trial related" considerations. His view is simply that Louisiana district attorneys cannot practice discrimination by use of peremptory challenges even if reasonably related to trial considerations. The Louisiana constitution's absolute bar to "practicing trial-related racial discrimination" provides a simple straightforward solution to a difficult problem.

The court has apparently twisted the *Swain* test into something akin to the *Eames* concurrence. The writer has always viewed the *Swain* test as placing emphasis, wrongly or not, on the prosecutor's right to exercise trial related peremptory challenges without judicial supervision. If Louisiana has a different rule due to article I, section 3 of the Louisiana constitution, reliance on that standard should be clearly announced.

As a result of his role in the constitutional convention, Justice Dennis has a special understanding of the history and meaning of our present constitution. His approach taken in *Eames* would probably require the state to explain its use of peremptory challenges of blacks. This is preferable to the court's present effort to construe *Swain* as dictating the result in *State v. Washington*[65] and *State v. Brown*.[66]

Witherspoon: CONSTITUTIONAL CHALLENGES TO THE DEATH PENALTY

In response to *Witherspoon v. Illinois*,[67] Louisiana amended article 798 of the Code of Criminal Procedure to comply with the United States Supreme Court's guidelines for excusing jurors with "conscientious scruples" against the death penalty.[68]

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64. LA. CONST. art. I, § 3 provides:

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime.

65. 375 So. 2d 1162 (La. 1979).

66. 371 So. 2d 751 (La. 1979).

67. 391 U.S. 510 (1968).

68. 1968 La. Acts, Ex. Sess. No., 13, *amending* LA. CODE CRIM. P. art. 798. This article provides:

> It is good cause for challenge on the part of the state, but not on the part of the defendant, that:
>
> (1) The juror is biased against the enforcement of the statute charged to have been violated, or is of the fixed opinion that the statute is invalid or un-

Following *Furman v. Georgia*[69] the Louisiana Supreme Court continued to treat capital cases as "capital" for procedural purposes, such as the denial of bail, unanimity of verdict, sequestration of jurors, and joinder, despite the fact that defendants were not exposed to the risk of death.[70] In *State v. Willis*[71] the defendant was charged with aggravated rape at a time when the offense was statutorily punishable by death. However, in *Selman v. Louisiana*,[72] decided prior to the trial in *Willis*, the United States Supreme Court declared the Louisiana death penalty in cases of aggravated rape unconstitutional in light of *Furman*.

The issue presented in *Willis*, a case in which the death penalty was judicially reprobated prior to trial, was whether the trial judge erred in permitting the state to challenge jurors for cause due to their attitudes toward capital punishment. The court held that permitting such challenges for cause had the effect of granting the state more peremptory challenges than it was entitled to and reversed the conviction.

The result reached by the supreme court is correct. However, the court should reevaluate its position as to the noncapital nature of procedures applicable in all cases in which the death penalty is not applicable due to judicial action.

DOUBLE JEOPARDY—UNAUTHORIZED MISTRIALS

In *State v. Simpson*[73] the supreme court logically and correctly applied Louisiana's double jeopardy provisions to produce an unfortunate result. During the defendant's first trial for armed robbery, a state witness was asked on cross-examination by the defense counsel about offenses for which he had not been convicted. The trial court improperly ordered a mistrial on the basis that the jury

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constitutional;

(2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it unmistakably clear (a) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt; or

(3) The juror would not convict upon circumstantial evidence.

69. 408 U.S. 238 (1972).

70. *See* State v. McZeal, 352 So.2d 592 (La. 1977); State v. Lott, 325 So. 2d 576 (La. 1976); State v. Flood, 263 La. 700, 269 So. 2d 212 (1972); State v. Holmes, 263 La. 685, 269 So. 2d 207 (1972).

71. 364 So. 2d 961 (La. 1978).

72. 428 U.S. 906 (1976).

73. 371 So. 2d 733 (La. 1979).

may have an "unfavorable impression" of the witness due to the defense counsel's improper questions.

The defendant asserted that trying him a second time—which resulted in his conviction for simple robbery—constituted double jeopardy. Because the mistrial was not legally granted, jeopardy attached and barred further proceedings.

Canvassing the grounds for mistrials, the supreme court properly found none to justify the trial court's action. Even though the state is substantially prejudiced by improper defense cross-examination of a witness, a mistrial is not an available remedy under Louisiana law unless the defendant consents to the mistrial. The trial court's only option was to sustain the state's objection and to give a curative instruction.

DOUBLE JEOPARDY—"PARTIAL DIRECTED VERDICTS"

The supreme court held in *State ex rel. Robinson v. Blackburn*[74] that double jeopardy barred the defendant's conviction of second degree murder following the trial court's granting of a directed verdict as to first degree murder, the offense charged in the indictment.

Following the close of the state's case, the defendant had moved for a directed verdict on the basis that the state failed to prove an essential element of first degree murder. The trial judge agreed, finding that the state's evidence only proved second degree murder, and granted a "partial directed verdict." The defendant then pled guilty to second degree murder. In a collateral proceeding, the supreme court set the conviction aside. The court found that the defendant's guilty plea did not bar his plea of double jeopardy because prior jeopardy is a "jurisdictional defect" not waived by a guilty plea.

In *Blackburn* the supreme court also announced that Louisiana law did not authorize the trial court to grant a partial directed verdict in those situations in which the court finds that the evidence will not support the offense charged but will suppport conviction for a lesser offense. Thus, the directed verdict was treated as an acquittal on the offense charged as well as of all lesser offenses.

There is no reason, however, why a total acquittal should follow from the state's failure to prove the offense charged if the evidence properly supports a verdict of guilty of a lesser included offense. It is therefore submitted that the legislature should reinstitute the directed verdict and provide the judge with the authority to direct a

74. 367 So. 2d 360 (La. 1979).

verdict only as to the offense charged. The jury should then be permitted to consider the question of guilt or innocence only on lesser included responsive verdicts.

RECUSATION OF THE TRIAL JUDGE

In the conduct of proceedings before them, trial courts must provide the "appearance of justice." When an ad hoc judge, whose law partner is the legal representative of the local sheriff, sits in a resisting-arrest case involving a sheriff's deputy, the appearance of justice suffers despite the sincerest efforts of the judge to decide fairly.

In *State v. LeBlanc*[75] the defendant's counsel first learned of the ad hoc judge's relationship to the sheriff's office after his client's conviction. In analyzing the grounds for recusal, the supreme court found that the "catchall provision"[76] of article 671 of the Code of Criminal Procedure was applicable in situations where "the appearance of partiality" might be created. Furthermore, the defendant was allowed to raise the issue even though the Code requires that motions to recuse be raised prior to verdict.[77] The supreme court held that the trial judge erred in failing to recuse himself on his own motion. The court deftly side-stepped a procedural bar, *i.e.*, the timeliness of the raising of the issue, in order to announce its firm disapproval of the trial judge's failure to recognize an obligation not to sit on the defendant's case.

RECORD OF PROCEEDINGS

The Louisiana constitution guarantees that a person will not be deprived of liberty or property without "the right of judicial review based upon a complete record of all evidence upon which the judgment is based."[78] The right to review presumably includes the right to apply for supervisory writs in a non-appealable criminal case.

In proposing revisions to the Code of Criminal Procedure to respond to changes dictated by the 1974 constitution, the Louisiana State Law Institute has recommended that a record of the proceedings be made in all felony cases whether requested or not. The

75. 367 So. 2d 335 (La. 1979).

76. *See* LA. CODE CRIM. P. art 671(6), comments.

77. LA. CODE CRIM. P. art. 674.

78. LA. CONST. art. I, § 19. This section provides:

> No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law.

Institute did not recommend that a record be kept in misdemeanor cases absent a request by the defendant, because in many of these cases no review may even be contemplated. Thus, the legislature placed upon the defendant the relatively simple burden of requesting that misdemeanor proceedings be recorded in order to assure adequate review in the event of an unfavorable verdict.

In *LeBlanc*,[79] a misdemeanor case, the supreme court held that the defendant's failure to ask that a record be made was not a waiver of his constitutional right of review based on a full record. The court also held that the legislature cannot condition the exercise of that right upon an advance request that a record be made.

The effect of *LeBlanc* is to require that all evidence be recorded in misdemeanor cases unless the defendant specifically waives his right. The supreme court has properly equated the right to have a record made with the right to meaningful review. Without a record, there can be no transcript; without a transcript or some constitutionally adequate alternative, there can be no meaningful review.

TRIAL BY SIX-MEMBER JURY—UNANIMOUS VERDICT

In *Burch v. Louisiana*[80] the United States Supreme Court declared unconstitutional Louisiana's nonunanimous verdict in six-member jury cases. The Louisiana Supreme Court, however, had no guidance from the federal court regarding the retroactive application of *Burch*. In *State v. Brown*[81] the court relied on earlier United States Supreme Court cases dealing with the right to jury trial[82] and with unrelated areas in deciding that *Burch* should not be given retroactive appliction to cases in which the jury was empaneled prior to April 17, 1979, the date of the *Burch* decision.

The writer feels that *Brown* was correctly decided and hopes that the lower federal courts will agree with the Louisiana Supreme Court's approach. The distinction between a nonunanimous twelve-member jury verdict and a nonunanimous six-member jury verdict is difficult to articulate. Louisiana's reliance on prior standards was certainly justified. Prospective application of the new unanimity requirement will suffice, and the accuracy of the fact-finding was not so sorely affected as to justify retroactive application.

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79. See text at notes 75-77, *supra*.

80. 99 S. Ct. 1623 (1979). For a discussion of *Burch*, see Note, *Right to Trial by Jury: New Guidelines for State Criminal Trial Juries*, 40 LA. L. REV. 837 (1980).

81. 371 So. 2d 746 (La. 1979).

82. Daniel v. Louisiana, 420 U.S. 31 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975).

In a per curiam opinion in *State v. Jackson*,[83] the supreme court had occasion to interpret the impact of *Burch* regarding the number of jurors required for acquittal. The court summarily stated, incorrectly in the writer's view, that in six-member jury cases, all six jurors must concur to reach a verdict of guilty or not guilty.

In *State v. Claiborne*[84] the trial judge, in advance of the close of the evidence, advised the prosecution that he intended to instruct the jury that all six must concur to convict but that only five must concur to acquit. The trial judge[85] properly relied on the Louisiana constitutional right of the accused to a verdict of acquittal based on the concurrence of five jurors.[86] As in *Jackson*, the supreme court summarily reversed and ordered the trial judge to instruct the jury that all six must concur to convict or to acquit.

Burch only held that a nonunanimous jury could not convict. It did not hold, nor could it have held, that the sixth amendment entitles the state to any rights regarding the issue of unanimity. The fact that the draftsmen of the Louisiana constitution may not have approved such an unbalanced approach—unanimity to convict, but nonunanimity to acquit—is not the issue. The Louisiana constitution explicitly provides that only five jurors must concur to acquit. Resolving the "fairness" of the situation is a matter left not to the supreme court but rather to the legislature and the voters. It can be easily argued that if five of six jurors find that the prosecution failed to produce proof of guilt beyond a reasonable doubt, the state should be barred from reprosecution of the case.

JUROR IMPEACHMENT OF THE VERDICT

In two cases[87] decided during the last term, the Louisisana Supreme Court held that Louisiana Revised Statutes 15:470[88] does not disallow jurors from testifying as to misconduct or activity by non-jurors which improperly influenced members of the jury.

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83. 370 So. 2d 570 (La. 1979).

84. 370 So. 2d 1257 (La. 1979).

85. The trial judge was Hon. P. Raymond Lamonica, Professor of Law, Louisiana State University, sitting as judge pro tempore filling a vacancy.

86. LA. CONST. art. I, § 17.

87. State v. Wisham, 371 So. 2d 1151 (La. 1979); State v. Marchand, 362 So. 2d 1090 (La. 1978).

88. LA. R.S. 15:470 (1950) provides:

> No juror, grand or petit, is competent to testify to his own or his fellows' misconduct, or to give evidence to explain, qualify or impeach any indictment or any verdict found by the body of which he is or was a member; but every juror, grand or petit, is a competent witness to rebut any attack upon the regularity of the conduct or of the findings of the body of which he is or was a member.

In *State v. Marchand*[89] the jury requested they be permitted to inspect the defendant's confession. Although the confession was in evidence, the legislation and jurisprudence clearly disallow such a document's use by the jury during deliberations.[90] The trial judge, after conference with counsel, disallowed the request. The bailiff, in delivering the message denying the request, informed the foreman (and another juror) that the defense counsel's objection prevented the judge from acceding to their request.

The supreme court found no difficulty in determining that such a communication was improper and prejudicial to the accused. It was irrelevant that the bailiff's error was inadvertent. The court held that the trial judge correctly permitted the two jurors to testify concerning the bailiff's statement to them but not concerning the effect the statement had on their deliberations. In reversing the conviction, the supreme court said that evidence of overt acts of misconduct by third persons was properly the subject of a juror's testimony.

Following the same theme, the supreme court in *State v. Wisham*[91] held that two jurors who allegedly viewed the arrest of a defense witness during a recess of the trial should have been permitted to testify concerning their observations at a motion for a new trial.

In *Wisham*, after a defense alibi witness testified, the trial court ordered a recess. During the recess two of the jurors happened to enter an adjacent hallway in the courthouse. There they saw deputies in the process of arresting the defense alibi witness. During cross-examination of the witness, the prosecutor made numerous references to the crime of perjury.

In his motion for a new trial, the defense counsel alleged that the jurors would testify not only that they observed the arrest but also that they told the other jurors and that it was discussed at length during jury deliberations. The trial judge refused to permit the defense to offer this evidence, predicating his ruling on Revised Statutes 15:470.

Remanding for a new hearing on the motion for a new trial, the supreme court ordered the trial court to hear evidence of the jurors relative to viewing the arrest and informing the others of its occurrence. In a footnote, the court said that the trial judge correctly

89. 362 So. 2d 1090 (La. 1978).

90. LA. CODE CRIM. P. art. 793. *See, e.g.*, State v. Freetime, 303 So. 2d 487 (La. 1974).

91. 371 So. 2d 1151 (La. 1979).

prevented testimony concerning the effect of the arrest on the jurors.[92] The court said that the fact that jurors knew of it was "presumptively prejudicial" but that the state could offer evidence to "overcome the presumption."

Louisiana Revised Statutes 15:470 only bars evidence to "impeach" the jury's verdict. On remand, presumably this statute would not preclude the jurors from testifying concerning the lack of prejudicial effect in an effort to support the verdict. If this is done, it would surely be unfair to deny to the defendant the opportunity to elicit from jurors any prejudicial effects which the incident had on their deliberations.

DISCLOSURE OF PRESENTENCE INFORMATION

In a recent series of cases, the supreme court has made progress toward disclosure of presentence information to the defendant. Beginning with the proposition that prejudicial information shown to be false or misleading must be disclosed—an easy position to adopt—the court now seems only to require an allegation that the report contains information which is false or misleading.

In November, 1978, in *State v. Boone*,[93] the supreme court affirmed the trial court's failure to afford the defense counsel access to a presentence report and the opportunity to rebut any unfavorable information in it. Although the court said that a *showing* that the report contained false, prejudical information was required in order to establish a right to access, the real basis for the decision seemed to be the defendant's failure to establish his request for access. Clearly he must request access.

One month later in *State v. Trahan*,[94] the supreme court reversed the trial court's refusal to provide access to the report and the opportunity to rebut unfavorable material. The defendants, husband and wife, were convicted of distribution of "PCP," a controlled dangerous substance. The presentence report, which was sealed and sent to the supreme court, reported that the husband was the "chief drug dealer" in the parish and that the wife was "as deeply implicated" as her husband.[95]

Prior to sentencing, the defense counsel moved for access to the report. He alleged that it contained prejudicially false information incorrectly picturing the defendants' activities. He requested but

92. *Id.* at 1154 n.2.
93. 364 So. 2d 978 (La. 1978).
94. 367 So. 2d 752 (La. 1978).
95. *Id.* at 753.

was denied an opportunity to controvert the information and to offer explanations for unfavorable hearsay contained in the reports.

In reversing and ordering disclosure and an opportunity to rebut or explain, the supreme court relied on the defendant's right to access upon request and "appropriate allegation."[96] The court's emphasis in *Trahan* was upon the "appropriateness" of the allegation and not upon a showing of falsity.

The court's direction is good and should be expanded. The trial court has the discretion to disclose presentence data. The supreme court should exercise its supervisory jurisdiction to require disclosure, upon request, of all adverse information, whether alleged to be false or not, absent some showing of good cause to keep such information from the accused. Otherwise, the defendant may not know of the existence of false, adverse information and may not be in a position to allege its falsity.

RETROACTIVE APPLICATION OF CAPITAL SENTENCING PROCEDURES

In *State v. Burge*,[97] decided on September 5, 1978, the supreme court rejected the defendant's complaint that the bifurcated capital sentencing trial procedure was improperly employed in a case of aggravated kidnapping. The offense charged was committed prior to the date of the legislation adopting the bifurcated sentencing procedure. However, by the time of the defendant's trial, the legislation was in effect. The sentencing hearing resulted in a jury recommendation directing the trial court to sentence the accused to life imprisonment.

Rather than simply rejecting his complaint because he was sentenced to life, the supreme court chose to discuss the retroactive application of the capital sentencing procedures. The court, in an opinion by former Chief Justice Sanders, said that the sentencing hearing does not increase the severity of the offense but rather allows the jury to mitigate its severity. Thus, the court found that the capital sentencing legislation was procedural and hence could be applied to all proceedings taking place after its effective date without violating constitutional ex post facto prohibitions.

Several months later, in April, 1979, in *State v. Collins*,[98] the supreme court for the first time confronted the situation in which a death penalty was imposed by a jury following a sentencing hearing conducted for an offense committed prior to the enactment of the

96. *Id.* at 754.
97. 362 So. 2d 1371 (La. 1978).
98. 370 So. 2d 533 (La. 1979).

bifurcated sentencing procedure. In setting aside the death penalty, the supreme court refused to follow the logic of the United States Supreme Court's decision in *Dobbert v. Florida*[99] or its own opinion in *Burge*. The court relied on its own assessment of a state statutory prohibition against retroactive application of new statutes. The court did not attempt to reach constitutional issues. The legislature's failure to specify that the procedures should be applied to proceedings involving crimes committed prior to its date was the court's basis for finding an intent that the procedures be applied prospectively only.[100]

The court's approach in *Collins* was predictable in light of its January, 1979, opinion in *State v. English*.[101] In *English* the court decided not to apply retroactively an amendment to the capital sentencing procedures allowing the court to grant a new trial on the question of penalty in the event of error in the sentencing hearing. At the time of English's crime, if error were committed in the sentencing hearing, the court was required to set aside the death penalty and order that a sentence of life be imposed, without the state being given a second opportunity to seek the death penalty.

The court found that its decision was mandated by "ex post facto principles."[102] The court reasoned that the change in the state's Code of Criminal Procedure which permitted the state to re-try the sentencing issue exposed the defendant to a more severe penalty than those existing under the procedures in effect at the time of the offense.

The writer is not surprised by the court's unwillingness to grant "procedural" status to capital sentencing procedures. Such changes can literally be "life or death" matters to the defendant. All efforts to extend or even to provide constitutionally acceptable procedures for capital punishment by changes in capital sentencing procedures will probably meet with similar results. For example, by Act 74 of 1979, the legislature amended article 905.4 of the Code of Criminal Procedure to include new aggravating circumstances justifying the imposition of the death penalty.[103] Under *Collins* and *English*, these

99. 432 U.S. 282 (1977).

100. The writer notes with interest the court's failure to discuss or distinguish former Chief Justice Sanders' opinion in *Burge*. The Chief Justice retired before the court heard the *Collins* case.

101. 367 So. 2d 815 (La. 1979).

102. *Id.* at 821.

103. Act 74 added the following aggravating circumstances:

. . . .

(c) the offender . . . has a significant prior history of criminal activity;

. . . .

(h) the victim was a witness in a prosecution against the defendant, gave

will obviously not be applied in cases of crimes committed prior to the effective date of Act 74.

APPELLATE REVIEW OF SENTENCE

In *State v. Sepulvado*[104] the supreme court finally announced its willingness to review the trial court's sentences under the "excessiveness" standard of article I, section 20 of the Louisiana constitution.[105] The standards to be applied are those legislatively announced in the aggravating and mitigating circumstances of article 894.1 of the Code of Criminal Procedure.[106] The court talked in terms

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material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment, was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

LA. CODE CRIM. P. art. 905.4, *as amended by* 1979 La. Acts, No. 74. For the aggravating circumstances included in article 905.4 prior to Act 74, see note 31, *supra*.

104. 367 So. 2d 762 (La. 1979). For an excellent and detailed analysis of *Sepulvado*, *see* Note, *Appellate Review of Sentences: A New Standard in Louisiana*, 39 LA. L. REV. 1172 (1979).

105. LA. CONST. art. I, § 20 provides: "No law shall subject any person to euthanasia, to torture, or to cruel, excessive, or unusual punishment. Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense."

106. LA. CODE CRIM. P. art. 894.1 provides:

A. When a defendant has been convicted of a a felony or misdemeanor, the court should impose a sentence of imprisonment if:

(1) There is an undue risk that during the period of a suspended sentence or probation the defendant will commit another crime;

(2) The defendant is in need of corectional treatment or a custodial environment that can be provided most effectively by his commitment to an institution; or

(3) A lesser sentence will deprecate the seriousness of the defendant's crime.

B. The following grounds, while not controlling the discretion of the court, shall be accorded weight in its determination of suspension of sentence or probation:

(1) The defendant's criminal conduct neither caused nor threatened serious harm;

(2) The defendant did not contemplate that his criminal conduct would cause or threaten serious harm;

(3) The defendant acted under strong provocation;

(4) There was substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;

(5) The victim of the defendant's criminal conduct induced or facilitated its commission;

(6) The defendant has compensated or will compensate the victim of his

of manifest abuse of discretion and spoke of giving "great weight"[107] to the "factual characterizations of the aggravating and mitigating circumstances."[108] Nevertheless, the trial court's sentence is not immune from review for abuse of discretion.

In conjunction with *Sepulvado*, it is necessary to note the court's rejection in *State v. Cox*[109] of the contemporaneous objection rule. Such an objection is not necessary to see that an adequate record is available for review. A statement of considerations taken into account and the factual basis for imposing sentence must be given in order to comply with article 894.1. Neither is the contemporaneous objection rule required to put the trial court on notice that the defendant objects. Trial courts may assume that defendants will complain on appeal regarding the sentence. However, hopefully, if a sentence is specified as part of a plea bargain, the court will not consider complaints if the plea bargain was intelligently and knowingly entered into by the accused.

The writer also notes that in the cases following *Sepulvado*, the supreme court merely remanded to the trial court to resentence.[110] Although rather specific instructions as to how to sentence the defendant were given to the trial court in *Sepulvado*, this approach will apparently only be taken in rare cases. Presumably, the supreme court will not generally undertake to "resentence" the defendant but will remand the case to the trial court with guidelines to consider.

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criminal conduct for the damage or injury that he sustained;

(7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the instant crime;

(8) The defendant's criminal conduct was the result of circumstances unlikely to recur;

(9) The character and attitudes of the defendant indicate that he is unlikely to commit another crime;

(10) The defendant is particularly likely to respond affirmatively to probationary treatment; and

(11) The imprisonment of the defendant would entail excessive hardship to himself or his dependents.

C. The court shall state for the record the considerations taken into account and the factual basis therefor in imposing the sentence.

107. 367 So. 2d at 767.

108. *Id.*

109. 369 So. 2d 118 (La. 1979).

110. State v. Watson, 372 So. 2d 1205 (La. 1979); State v. Jacobs, 371 So. 2d 727 (La. 1979); State v. Gist, 369 So. 2d 1339 (La. 1979); State v. Terriault, 369 So. 2d 125 (La. 1979); State v. Cox; 369 So. 2d 118 (La. 1979).

APPELLATE REVIEW—SUFFICIENCY OF EVIDENCE IN DELINQUENCY CASES

In *In re Baptiste*[111] the supreme court, in reviewing the sufficiency of evidence to support an adjudication of delinquency, clearly stated that it was not bound by the "total lack of evidence" standard. Since the appellate jurisdiction of the supreme court in civil cases "extends to both law and facts,"[112] the court logically treated review of delinquency adjudications under its civil, rather than criminal, jurisdiction. This interpretation seems in accordance with the other treatment of appellate jurisdiction regarding delinquency cases. The appeal in such cases is to the court of appeal rather than the supreme court as in criminal cases.[113]

The supreme court in *Baptiste* dismissed the case on a finding that the state's evidence was *insufficient* to establish proof beyond a reasonable doubt. The writer is not convinced that the result would have been different under the circumstances presented even with a proper application of the "question of law" standard, *i.e.*, whether the evidence was so lacking that no reasonable man could fail to entertain a reasonable doubt. Since the United States Supreme Court's decision in *Jackson v. Virginia*,[114] this standard is also the test to be applied in adult criminal cases. The test enunciated in *Jackson* is whether, after viewing the evidence in the light most favorable to the prosecution, any reasonable judge or juror could have found the defendant's guilt was proven beyond a reasonable doubt. Under the *Jackson* rationale, the reviewing court must determine "whether the record could reasonably support a finding of guilt beyond a reasonable doubt."[115]

The Louisiana Supreme Court's adoption of the civil standard of review of facts in delinquency cases is logical. The court is clearly required to review the legal sufficiency of evidence to support adjudications of delinquency.

APPELLATE REVIEW—CREATION OF "JUDGMENT OF ACQUITTAL" IN JURY CASES

In two cases decided on October 9, 1978, the supreme court finally responded to a crucial problem created by the legislative abolition of the directed verdict in jury trials. The court earlier recognized the

111. 359 So. 2d 1077 (La. 1978).
112. LA. CONST. art. V, § 5.
113. LA. CONST. art. V, § 10.
114. 99 S. Ct. 2781 (1979). The Louisiana Supreme Court applied *Jackson* in *State v. Matthews*, No. 64,079 (La. Sept. 4, 1979).
115. 99 S. Ct. at 2789.

need to reverse convictions in cases in which there was a "total lack of evidence." Without the directed verdict, the issue of lack of legally sufficient evidence to sustain the conviction must be raised by a motion for a new trial. Although the defendant's only option was to move for a new trial, he really sought an acquittal, not an opportunity to permit the state to re-try him and to supply additional evidence.

In *State v. Thompson*[116] and *State v. Liggett*,[117] the supreme court, in opinions authored by Justice Marcus, held that the double jeopardy protection of the fifth amendment prohibits the state from having such a second chance. If the state's evidence is insufficient to sustain the conviction, the defendant is entitled to a judgment of acquittal, not merely a new trial. Thus, in effect, the court has judicially adopted a procedure by which the defendant, after conviction, moves for a judgment of acquittal notwithstanding the verdict.

Several months later, the court was confronted with a different dimension of the problem. In *State v. Hudson*[118] the trial judge granted a new trial after the jury convicted the defendant of first degree murder. In granting the new trial, the trial judge indicated his dissatisfaction with the strength of the state's evidence.

The state brought the case to trial a second time and presented additional evidence. The jury again convicted the defendant. In a post-trial application for relief, the defendant contended that the second trial was barred by double jeopardy.

The supreme court recognized a distinction between the trial judge's granting a new trial because he is not convinced beyond a reasonable doubt and the trial judge's granting a new trial because he finds that the evidence presented was insufficient as a matter of law. The trial judge may, in a motion for a new trial, sit as a "thirteenth juror" and grant a new trial because he was not convicted by the state's evidence beyond a reasonable doubt.[119] However, if he finds the evidence so lacking that a reasonable juror must have entertained a reasonable doubt, then the trial judge must grant a judgment of acquittal.[120]

Confusion has arisen due to the failure of the supreme court to announce a judicially created device to solve the dilemma presented by the legislature's abolition of the directed verdict. The trial court must learn to distinguish clearly between the motion for a new trial and the judicially created motion for acquittal.

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116. 366 So. 2d 1291 (La. 1978).
117. 363 So. 2d 1184 (La. 1978).
118. 373 So. 2d 1294 (La. 1979).
119. *See* State v. Jones, 288 So. 2d 48 (La. 1973).
120. *See* State v. Matthews, No. 64,079 (La. Sept. 4, 1979).

PROBATION REVOCATION—ADMISSIBILITY AND WEIGHT OF HEARSAY EVIDENCE

In *State v. Lassai*[121] the supreme court dealt with the admissibility of documentary hearsay at a probation revocation hearing. Over a defense objection, a urinalysis report was offered to prove that the defendant was illegally using drugs while residing at a narcotics rehabilitation center. The court said the admission of the report "violated minimum due process rights of confrontation." However, because there was other evidence of drug use, the court said the error was not reversible.[122]

The supreme court again confronted the question of documentary hearsay at revocation hearings in *State v. Harris.*[123] The trial court had permitted the district attorney to offer into evidence a police arrest report containing information regarding the commission of a robbery by the probationer. The report's contents were considered insofar as they tended to prove that the probationer engaged in criminal conduct.

The supreme court found that the trial court had erred in basing its judgment to revoke solely on documentary evidence. The court said the hearsay documentary evidence presented insufficient proof of the criminal activity which was the basis for revocation. Nevertheless, the court recognized that under some circumstances it is appropriate to use documentary evidence in lieu of live testimony at a probation revocation hearing. In a footnote to *Harris*, it was made clear that, absent good cause for not allowing confrontation, the trial court should not permit such documentary evidence to substitute for live testimony.

The court's approach in *Harris* is far more sophisticated than that in *Lassai.* Possibly the court will approve the sufficiency of revocations based on reliable, although normally inadmissible, hearsay if a sufficient showing of a good cause is made to excuse its use. The court had indicated that an appropriate balance must be struck between the need for reliable evidence at revocation hearings and the need to prevent revocation hearings from assuming all of the attributes of criminal trials. By placing the emphasis on the "insufficiency" of hearsay and on the need for "good cause," the court has clearly recognized the defendant's right to a reliable fact-finding process at revocation hearings but has avoided adopting a view that all of the evidentiary rules associated with criminal trials must be followed.

121. 366 So. 2d 1389 (La. 1978).

122. The court did, however, reverse the revocation on other grounds. See text at note 124, *infra.*

123. 368 So. 2d 1066 (La. 1979).

REVOCATION OF PROBATION—DISCRETION OF TRIAL COURTS

The supreme court in *Lassai* evinced a willingness to review the appropriateness of the trial court's decision to revoke probation. Lassai, an addict, was sentenced to twenty-five years imprisonment for theft and receiving stolen property. His sentence was suspended on the condition that he reside at a narcotics rehabilitation center.

Urine tests were administered on a daily basis to all residents of the center. After a test indicated the presence of narcotics, Lassai admitted drug use to his probation officer; the officer recommended revocation of probation. Following a hearing, the trial court ordered the defendant to serve his twenty-five year sentence.

On writ of review, the supreme court found that the trial judge had abused his discretion by revoking probation. Despite the defendant's violation, the court said that the record did not support the decision to revoke. The court noted testimony by the staff of the narcotics rehabilitation center that more time was needed to work with the defendant and that they still considered him a good candidate for rehabilitation.

The writer does not disagree with the reversal of the trial court's decision to revoke. Although the supreme court seems to adopt a test of "arbitrary and capricious revocation"[124] for review of trial courts' judgments, the revocation in the present case was neither arbitrary nor capricious. The court nevertheless has a duty to exercise supervisory jurisdiction to set aside revocation of probation where it finds an abuse of discretion. The implication that the court will only set aside "capricious" or "arbitrary" revocations is misleading.

PROBATION—EXTENSION OF PERIOD OF PROBATION

The supreme court held in *State v. Guillory*[125] that once the period of probation is specified at sentencing, it cannot be extended even if the reason for the extension is a violation of the terms of probation.

Guillory was placed on probation after being convicted of burglary and theft. The period of probation was fixed at two years. Approximately one month prior to the end of his probationary period, the defendant came before the court charged with violating the terms of probation; he admitted the violations. Rather than revoking the defendant's probation, the trial court extended it for an additional two years. Sometime later, during the extended period, the

124. 366 So. 2d at 1391.
125. 363 So. 2d 511 (La. 1978).

defendant was again charged with violating his probationary terms. Following a hearing, the trial court revoked his probation and made his sentence of imprisonment at hard labor executory.

Since the second violation occurred after the initial two-year period had lapsed, the defendant contended that his probation had expired and could not be revoked. The supreme court agreed, finding that the Code of Criminal Procedure required a specified period of probation which could not be extended. The court found that the legislature did not authorize the trial court to extend, in lieu of revocation, a violation of probation.

Although the writer agrees with the supreme court's analysis, the trial court's response to the situation presented was both reasonable and preferable. Revocation, a mere reprimand, or even intensified supervision when only one month remained were really not satisfactory alternatives. The probationer's conduct clearly indicated a need for an extended period of supervision. In 1979, the legislature agreed with the trial court's response and, presumably in light of *Guillory*, amended article 900 of the Code of Criminal Procedure[126] to permit trial courts to extend probationary periods in lieu of revocation.

PROBATION REVOCATION—"MIRANDA" WARNINGS

In *State v. Lassai*[127] the supreme court rejected the contention that a probationer's statement to his probation officer admitting a violation of a term of probation could not be received in evidence at a probation revocation hearing unless "Miranda" warnings preceded the statement. The statement was an admission by the probationer that he used drugs in violation of his probation. It was made to the probation officer in a narcotics rehabilitation center in which the probationer was residing; no warnings preceded the statement. The probationer, however, did not claim that the statement was involuntary.

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126. 1979 La. Acts, No. 90, *amending* LA. CODE CRIM. P. art. 900. This article provides in pertinent part:

> After an arrest or service of a summons pursuant to article 899, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing. The hearing may be informal or summary. If the court decides that the defendant has violated, or was about to violate, a condition of his probation it may:
>
> . . . .
>
> (5) Extend the period of probation provided the total amount of time served by the defendant on probation for any one offense shall not exceed the maximum period of probation provided by law.

127. 366 So. 2d 1389 (La. 1978).

The supreme court rejected the defendant's contention without extended discussion,[128] relying on the decision of the Untited States Court of Appeals for the Fifth Circuit in *United States v. Johnson.*[129] *Johnson* upheld the use of such statements to prove grounds for revocation despite the lack of Miranda warnings.[130]

In his concurring opinion, Justice Dennis expressed the view that the application of article I, section 13 of the Louisiana constitution to this situation may produce a different result.[131] Presumably the majority did not feel that this constitutional provision would dictate a contrary result. It is unfortunate, however, that the court chose not to discuss this important issue in some degree of detail. From reading the court's opinion, probation officers and police officers are entitled to believe that they are permitted, without prior warnings, to direct questions to probationers in custody designed to elicit responses to be used as proof of probation violations.

The writer does not disagree with what appears to be the court's conclusion that, in probation revocation hearings, only the free and voluntary standard should be applicable to test the admissibility of statements to probation officers. However, due to the inadequate analysis offered by the court, the *Lassai* holding could imply that the same standard applies to statements secured through custodial police interrogation designed to elicit admissions for use in revocation hearings. Possibily the same result would follow. Nonetheless, the court should have thoroughly analyzed the issues prior to a pronouncement in dicta that "the *Miranda* rule has not been extended to probation hearings."[132]

EXPUNGEMENT OF RECORDS OF ARREST

In a series of decisions over the past several years, the supreme

128. The court was not required to reach the issue because it found that the revocation was an abuse of discretion despite the proof of violation. See text at note 124, *supra.*

129. 455 F.2d 932 (5th Cir. 1972).

130. The fifth circuit per curiam opinion in *Johnson* is similarly brief. There a probationer admitted the purchase and attempted sale of untaxed whiskey to his probation officer. No Miranda warnings preceded the interview. Rejecting the defense contention, the court said:

> A probation revocation hearing is not an adversary or criminal proceeding, . . . but is more in the nature of an administrative hearing intimately involved with the probationer's rehabilitation. An injection of the *Miranda* protection here could be toxic and produce a paresis in the probation process.

Id. at 933 (citations omitted). The court also noted the failure of the probationer to deny the admission or to attack its voluntariness.

131. 366 So. 2d at 1391 (Dennis, J., concurring).

132. 366 So. 2d at 1390.

court has intelligently interpreted Louisiana's limited provisions dealing with destruction of records of arrest in misdemeanor cases. Under Louisiana Revised Statutes 44:9, a person may move for the destruction of his record of arrests for misdemeanor violations in cases in which no conviction was obtained. Finding the purpose of the statute to be "remedial rather than penal," the court in *State v. Boniface*[133] liberally construed the statute to include destruction of records of arrest for offenses such as first offense possession of marijuana, no longer classified as a felony, even though the offense was classified as a felony at the time of the defendant's arrest.

This is an eminently reasonable position. In view of the remedial purpose of the expungement statute, the later legislative judgment that a particular conduct is not felonious clearly evidences the legislative intent to include such tranformed felonies within the statute's scope. As emphasized by the court, it serves "no justifiable end"[134] to refuse to apply the legislative benefit of destruction of arrest records in cases not resulting in conviction merely because the offense was previously classified as a felony.

133. 369 So. 2d 115 (La. 1979).
134. *Id.* at 117.